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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

MIKHAIL GERSHZON, an individual, on behalf of himself and all others similarly situated,

Case No: 3:24-cv-04142-RS

Plaintiff.

VS.

EVENT TICKETS CENTER, INC., a Florida Corporation;

Defendant.

**PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S
MOTION TO COMPEL ARBITRATION
AND DISMISS OR STAY LITIGATION**

Date: July 31, 2025

Time: 1:30 PM

Courtroom: 3

Judge: Hon. Richard Seeborg

Complaint Filed: July 9, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF ISSUES TO BE DECIDED	2
PROCEDURAL BACKGROUND.....	2
LEGAL STANDARD.....	4
ARGUMENT.....	5
I. The Court has the Authority to Rule on Waiver	5
II. Defendant Waived the Right to Arbitrate	7
A. Defendant knew about the agreement.....	7
B. Defendant acted inconsistent with the right to arbitrate	7
CONCLUSION.....	13

TABLE OF AUTHORITIES**Page(s)****CASES**

4	<i>Armstrong v. Michaels Stores, Inc.</i> , 59 F.4th 1011 (9th Cir. 2023)	1, 4, 5, 12
5	<i>Banq, Inc. v. Purcell</i> , 2024 WL 4164126 (9th Cir. Sept. 10, 2024)	7, 12
7	<i>Chan v. Panera, LLC</i> , 2024 WL 4137332 (C.D. Cal. Sept. 3, 2024)	7, 8, 10, 12
9	<i>Comm. Dental Serv. v. Tani</i> , 282 F.3d 1164 (9th Cir. 2002)	10
10	<i>Cox v. Ocean View Hotel Corp.</i> , 533 F.3d 1114 (9th Cir. 2008)	5
12	<i>DropZoneMS, LLC v. Cockayne</i> , 2019 WL 2070417 (D. Or. Feb. 27, 2019)	9
14	<i>Earn Guild PTE LTD v. Crowdcreate, LLC</i> , 2024 WL 5365055 (C.D. Cal. Dec. 16, 2024)	8
15	<i>Hill v. Xerox Bus. Serv., LLC</i> , 59 F.4th 457 (9th Cir. 2023)	7
17	<i>In re Google Assistant Privacy Litig.</i> , 2024 WL 251407 (N.D. Cal. Jan. 23, 2024)	7
19	<i>KST Data, Inc. v. DXC Tech, Co.</i> , 980 F.3d 709 (9th Cir. 2020)	9
20	<i>Martin v. Yasuda</i> , 829 F.3d 1118 (9th Cir. 2016)	5, 6, 7, 8
22	<i>Momot v. Mastro</i> , 652 F.3d 982 (9th Cir. 2011)	5
24	<i>Morgan v. Sundance, Inc.</i> , 142 S.Ct. 1708 (2022)	1, 4, 9, 13
25	<i>Noble v. Bank of America, N.A.</i> , 2015 WL 6602552 (N.D. Cal. Oct. 29, 2015)	7
27	<i>Plows v. Rockwell Collins, Inc.</i> , 812 F.Supp.2d 1063 (C.D. Cal. 2011)	7, 12

1	<i>Powel v. UHG I LLC</i> , 2024 WL 2305206 (S.D. Cal. May 21, 2024).....	13
2		
3	<i>Reinsdorf v. Skechers U.S.A., Inc.</i> , 296 F.R.D. 604 (C.D. Cal. 2013).....	10
4		
5	<i>Slaten v. Experian Information Solutions, Inc.</i> , 2023 WL 6890757 (C.D. Cal. Sept. 6, 2023)	passim
6		

RULES

7	Federal Rule of Civil Procedure 8(c)(1)	9
8	Federal Rule of Civil Procedure 26(f)	12, 13
9		

1 Plaintiff Mikhail Gershzon (“Plaintiff”) files the following memorandum of law in
 2 opposition to the Motion to Compel Arbitration (“Motion” or “Def. Mem”) (ECF No. 32) filed by
 3 Defendant Event Tickets Center, Inc. (“Defendant” or “ETC”).

4 **INTRODUCTION**

5 In 2022, the Supreme Court re-centered the jurisprudence on arbitration. Specifically, in
 6 *Morgan v. Sundance, Inc.*, in discussing the Federal Arbitration Act’s (“FAA”) “policy favoring
 7 arbitration,” it stated:

8 The policy is to make “arbitration agreements as enforceable as other contracts, but
 9 not more so.” Accordingly, a court must hold a party to its arbitration contract just
 10 as the court would to any other kind. But a court may not devise novel rules to favor
 11 arbitration over litigation. If an ordinary procedural rule—whether of waiver or
 12 forfeiture or what-have-you—would counsel against enforcement of an arbitration
 13 contract, then so be it. The federal policy is about treating arbitration contracts like
 14 all others, not about fostering arbitration.

15 *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708, 1713 (2022) (citations omitted).

16 The *Morgan* court noted that,

17 Section 6 of the FAA provides that any application under the statute—including an
 18 application to stay litigation or compel arbitration—“shall be made and heard in the
 19 manner provided by law for the making and hearing of motions” (unless the statute
 20 says otherwise). A directive to a federal court to treat arbitration applications “in
 21 the manner provided by law” for all other motions is simply a command to apply
 22 the usual federal procedural rules, including any rules relating to a motion’s
 23 timeliness. Or put conversely, it is a bar on using custom-made rules, to tilt the
 24 playing field in favor of (or against) arbitration.

25 *Id.* at 1714.

26 With this re-centering, the Ninth Circuit adjusted its position on waiver, in the arbitration
 27 context, to align with every other instance of waiver, *i.e.* “1) knowledge of an existing right to
 28 compel arbitration and (2) intentional acts inconsistent with that existing right.” *Armstrong v.
 Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023).

29 Here, Defendant has met both. It has litigated this matter for nearly a year. In that time, it
 30 answered the complaint, twice submitted to the Court a Rule 26(f) report, proposed a schedule that
 31 included deadlines to move for class certification, *requested a jury trial*, and engaged in discovery
 32 that encompassed Plaintiff and the putative class members. And all this time, nary a word about
 33 arbitration.

1 It is preposterous to say Defendant did not know of the terms on its own website, which it
 2 drafted. That it chose not to enforce some of those terms is a strategic decision that lies squarely
 3 on its shoulders. That it now has new counsel with new strategies does not entitle it to rewrite the
 4 choices it has already made. Quite simply, it made a decision and must now live with it.

5 **STATEMENT OF ISSUES TO BE DECIDED**

6 Whether Defendant waived its right to invoke the arbitration agreement in the terms it
 7 drafted and placed on its website when it litigated the action for nearly a year, including answering
 8 the complaint, submitting Rule 26(f) reports, submitting stipulated protective orders, setting a
 9 schedule for class certification, requesting a jury trial, and engaging in discovery?

10 **PROCEDURAL BACKGROUND**

11 On July 9, 2024, Plaintiff filed this action; nearly a year ago. *See* ECF No. 1

12 On September 11, 2024, the parties filed a Stipulated Protective Order. *See* ECF No. 11.

13 On September 30, 2024, Defendant filed an answer that did not mention arbitration,
 14 including in its affirmative defenses. *See* ECF No. 14.

15 On October 4, 2024, the parties filed a Joint Case Management Statement. *See* ECF No.
 16 18. In the “Motions” section, Defendant stated, “Defendant anticipates opposing any Motion for
 17 Class Certification. Defendant also may file a Motion for Summary Judgment/Adjudication.” *Id.*
 18 § 4. In the “Discovery” section, Defendant stated, “Defendant will serve discovery shortly.
 19 Defendant asserts discovery should be bifurcated because Defendant contends Plaintiff does not
 20 have viable individual claims.” *Id.* § 8. In the “Narrowing of the Issues” section, it stated, “The
 21 Parties have identified that the following issues can be narrowed by motion: (1) whether Plaintiff
 22 may maintain the action as a class action, based upon Rule 23.” *Id.* § 14. The “parties” offered a
 23 proposed schedule, which included dates for class certification briefing, beginning in August 2025.
 24 *Id.* § 15, as well as additional dates pegged off of “a ruling on Plaintiff’s Motion for Class
 25 Certification.” Finally, in the “Trial” section, Defendant stated, “Defendant also **requests a jury**
 26 **trial** and anticipates trial will take two weeks.” *Id.* § 16 (emphasis added).

27 After this case was reassigned, the parties refiled the Joint Case Management Statement on
 28 October 24, 2024. The only substantive difference from the previous version was that it reflected

1 that initial disclosures were already served. *See* ECF No. 22

2 On October 31, 2024, the parties resubmitted the Stipulated Protective Order. *See* ECF No.
 3 25. That same day, the Court held a Case Management Conference, in which it adopted the parties'
 4 proposed schedule on Plaintiff's Motion for Class Certification. *See* ECF No. 26.

5 On November 14, 2024, Defendant filed a Notice of Related Case and requested to have a
 6 separate case, *Hernandez v. Event Tickets Centers, Inc.*, No. 2:24-cv-1983-DAD-AC (E.D. Cal.),
 7 transferred and related to this action. *See* ECF No. 27. As part of that request, Defendant noted
 8 that both seek to represent putative classes. *Id.* ¶ 4. It then argued that "adjudicating these two cases
 9 separately risk judicial interference and inconsistent judgments for substantially similar cases in
 10 two different District Courts." *Id.* ¶ 5. It therefore requested "that the subsequently filed *Hernandez*
 11 matter be transferred to same District Judge for this current case, the Honorable Richard Seeborg
 12 in the Northern District of California." *Id.*

13 On November 8, 2024, Plaintiff served his first set of discovery requests on Defendant,
 14 which Defendant answered on December 9, 2024. Declaration of Ben Travis, ¶ 3. Defendant also
 15 produced documents in response. *Id.*

16 On December 20, 2024, Plaintiff served his second set of discovery requests on Defendant,
 17 which Defendant answered substantively on February 4, 2025. *See* Travis Decl., ¶ 4. Several of
 18 these requests were clearly focused at the class as a whole, for example, seeking "All complaints
 19 YOU received from consumers since 2020 RELATING TO counterfeit tickets," and "State the
 20 total number of events for which tickets were sold through YOUR website since July 9, 2020." At
 21 no time did Defendant object based on the arbitration clause. *Id.* Along with the responses,
 22 Defendant produced documents. *Id.*

23 On March 12, 2025, the Parties had a meet-and-confer conference to discuss issues with
 24 Defendant's responses and production. At no time during the call was arbitration mentioned. The
 25 Parties agreed that Defendant's Counsel would speak to his client to obtain additional documents
 26 and provide amended responses. The Parties agreed that Plaintiff will summarize the issues in a
 27 letter. Travis Decl. ¶ 5.

1 On March 20, 2025, Defendant moved to substitute counsel, which was granted on March
 2 24, 2025. *See* ECF No. 31.

3 On April 3, 2025, the Parties met again and discussed various aspects of the case including
 4 discovery. Travis Decl. ¶ 6. Plaintiff agreed to send a deficiency letter to Defendant's counsel so
 5 that he could discuss with his client, and the Parties could have a meaningful discussion. *Id.*

6 On April 22, 2025, Plaintiff sent a deficiency letter to Defendant regarding its production
 7 and responses and requested to meet and confer regarding the discovery disputes and other items
 8 on April 24, 2025. Travis Decl. ¶ 7. On April 24, 2025, prior to the scheduled call, Defendant
 9 raised for the first time that it intended to file a Motion to Compel Arbitration. *Id.* ¶ 8.

10 On May 23, 2025—ten and a half months after the action was filed—Defendant moved to
 11 compel arbitration.

12 **LEGAL STANDARD**

13 “The [Supreme] Court in *Morgan* clarified that the pro-arbitration ‘federal policy is about
 14 treating arbitration contracts like all others, not about fostering arbitration.’” *Armstrong*, 59 F.4th
 15 at 1014 (quoting *Morgan*, 142 S. Ct. at 1713). “Put differently, the pro-arbitration federal policy
 16 is ‘to make ‘arbitration agreements as enforceable as other contracts, but not more so.’”
Armstrong, 59 F.4th at 1014 (quoting *Morgan*, 142 S. Ct. at 1713). “No longer is there a ‘special’
 18 rule favoring arbitration. Rather, courts ‘must hold a party to its arbitration contract just as the
 19 court would to any other kind’ but ‘may not devise novel rules to favor arbitration over litigation.’”
Armstrong, 59 F.4th at 1014 (quoting *Morgan*, 142 S. Ct. at 1713). “And it is error to require
 21 parties arguing waiver of the right to arbitration to demonstrate prejudice because ‘the usual federal
 22 rule of waiver does not include a prejudice requirement.’” *Armstrong*, 59 F.4th at 1014 (quoting
Morgan, 142 S. Ct. at 1714). “In short, contractual waiver generally requires ‘an existing right, a
 24 knowledge of its existence, and an actual intention to relinquish it, or conduct so inconsistent with
 25 the intent to enforce the right as to induce a reasonable belief that it has been relinquished,’ with
 26 no required showing of prejudice.” *Armstrong*, 59 F.4th at 1014.

27 In *Armstrong*, the Ninth Circuit “recognize[d] that *Morgan* overruled [its] prior precedents
 28 in two respects.” *Id.* “First, *Morgan* teaches that there is no ‘strong federal policy favoring

enforcement of arbitration agreements.”” *Id.* “The federal policy is to treat arbitration agreements like other contracts.” *Id.* “Although the party opposing arbitration still bears the burden of showing waiver, the burden is no longer ‘heavy.’” *Id.* “Instead, the burden for establishing waiver of an arbitration agreement is the same as the burden for establishing waiver in any other contractual context.” *Id.* at 1015. “Second, as we recently noted, *Morgan* abrogates our precedents to the extent they required the party opposing arbitration to demonstrate prejudice.” *Id.* “In view of *Morgan*, the party asserting waiver must demonstrate: (1) knowledge of an existing right to compel arbitration and (2) intentional acts inconsistent with that existing right.” *Id.*

ARGUMENT

I. The Court has the Authority to Rule on Waiver

As a threshold matter, the Court has authority to rule on whether Defendant waived the right to arbitrate. “The issue of waiver is a ‘question of arbitrability’ that is presumptively for a court to decide.” *Slaten v. Experian Information Solutions, Inc.*, 2023 WL 6890757, at *2 (C.D. Cal. Sept. 6, 2023) (quoting *Martin v. Yasuda*, 829 F.3d 1118, 1123 (9th Cir. 2016)). “But the parties may choose to have an arbitrator decide that issue by including ‘clear and unmistakable language to that effect’ in the arbitration agreement.” *Slaten*, 2023 WL 6890757, at *2 (quoting *Martin*, 829 F.3d at 1124).

Two Ninth Circuit cases are instructive. In *Martin*, the Ninth Circuit found that an arbitration provision providing that “all determinations as to the scope, enforceability, and effect of this arbitration agreement shall be decided by the arbitrator, and not by a court” failed to overcome the presumption that the court should decide waiver. 829 F.3d at 1124. In so holding, the Ninth Circuit relied on its earlier decision in *Cox*, where it had addressed the merits of a waiver issue despite an even broader arbitration provision providing that “**any controversy** involving the construction or application of the terms, provisions, or conditions of this Agreement or **otherwise arising out of or related to this Agreement** shall likewise be settled by arbitration.” *Id.* (citing *Cox*, 533 F.3d at 1117 (emphasis added)). By contrast, the Ninth Circuit in *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011), held that a provision “delegating to the arbitrators the authority to determine ‘the validity or application of any of the provisions of’ the arbitration clause” was clear and unmistakable evidence that the parties intended to delegate questions of arbitrability—in that case, the scope of the arbitration agreement—to the arbitrator.

Slaten, 2023 WL 6890757, at *3 (emphasis in original).

1 In *Slaten*, the court applied this precedent to the following clause:

2 All issues are for the arbitrator to decide, including the scope and enforceability of
 3 this arbitration provision as well as the Agreement's other terms and conditions,
 4 and the arbitrator shall have exclusive authority to resolve any such dispute relating
 5 to the scope and enforceability of this arbitration provision or any other term of this
 6 Agreement including, but not limited to any claim that all or any part of this
 7 arbitration provision or Agreement is void or voidable.

8 *Id.*

9 The *Slaten* court determined, “[t]he Arbitration Provision is as broad as the provisions in
 10 *Martin* and *Cox* and similarly does not mention waiver.” *Id.* “Nor is it clear whether the delegation
 11 of ‘[a]ll issues … including … any claim that all or any part of this arbitration provision or
 12 Agreement is void or voidable’ unmistakably encompasses waiver resulting from [the defendant’s]
 13 own conduct in judicial proceedings.” *Id.*

14 Defendant relies on *Momot* to argue that the following language means that all questions
 15 of arbitrability have been delegated to the arbitrator. *See Motion at 10-11.*

16 Any controversy, claim, dispute, or other action, arising out of or relating to the use
 17 of SITE, any order placed on SITE, or these policies including any dispute over the
 18 validity, enforceability, or scope of this arbitration provision (a 'CLAIM' or
 19 'CLAIMS') shall be resolved through binding arbitration administered by the
 20 American Arbitration Association.

21 Declaration of Eric Vikmanis, ECF No. 32-1, ¶ 7, Ex. A.

22 This language is no broader than that in *Martin*, *Cox*, and *Slaten*, which were found **not** to
 23 clearly delegate the issue of waiver. For example, the *Slaten* agreement delegated decisions on the
 24 “scope and enforceability of this arbitration provision”, but this was still not broad enough to
 25 encompass the issue of waiver. *Slaten*, 2023 WL 6890757, at *3. Equally, the language in *Martin*
 26 encompassed “all determinations as to the scope, enforceability, and effect of this arbitration
 27 agreement,” yet did not clearly delegate the issue of waiver. *Martin*, 829 F.3d at 1124.

28 And as the *Slaten* court pointed out, “*Momot* is distinguishable as it addressed whether a
 29 similarly broad provision encompassed a straightforward question of arbitrability and the scope of
 30 the agreement, not waiver.” *Slaten*, 2023 WL 6890757, at *3 .

31 Quite simply, the agreement does not contain the “clear and unmistakable language”
 32 necessary to delegate the question of waiver. As such, it is for the Court.

1 **II. Defendant Waived the Right to Arbitrate**

2 “A party asserting waiver must show ‘(1) knowledge of an existing right to compel
 3 arbitration; and (2) intentional acts inconsistent with that existing right.’” *Slaten*, 2023 WL
 4 6890757, at * 4 (quoting *Hill v. Xerox Bus. Serv., LLC*, 59 F.4th 457, 468-69 (9th Cir. 2023)). Both
 5 are present here.

6 **A. Defendant knew about the agreement**

7 It is well settled that “[k]nowledge of a contractual right to arbitrate is imputed to the
 8 contract’s drafter.” *In re Google Assistant Privacy Litig.*, 2024 WL 251407, at *4 (N.D. Cal. Jan.
 9 23, 2024) (quoting *Plows v. Rockwell Collins, Inc.*, 812 F.Supp.2d 1063, 1066 (C.D. Cal. 2011)).
 10 Defendant is the drafter of the agreement, and thus, it is imputed to have knowledge of the
 11 agreement on its own website, including the arbitration provision within it. *See Declaration of*
 12 *Doug Kruse*, ECF No. 32-4, ¶¶ 5-6 (“By clicking ‘Place Order,’ you are agreeing to
 13 EventTicketsCenter.com’s terms & polices”).

14 It would make a mockery of the judicial system to say that Plaintiff was aware of the terms
 15 by clicking the “PLACE ORDER” button, but Defendant—who drafted the terms and created the
 16 website—was not. In short, there is no plausible argument that Defendant was not aware of its
 17 terms, and with it, its right to arbitrate. *Noble v. Bank of America, N.A.*, 2015 WL 6602552, at *3
 18 (N.D. Cal. Oct. 29, 2015) (“Even if a party neither reads an agreement nor considers the legal
 19 consequences of signing it, the signing party is presumed to know its contents and is thus bound”).

20 **B. Defendant acted inconsistent with the right to arbitrate**

21 “There is no concrete test to determine whether a party has engaged in acts that are
 22 inconsistent with its right to arbitrate.” *Banq, Inc. v. Purcell*, 2024 WL 4164126, at *1 (9th Cir.
 23 Sept. 10, 2024) (quoting *Martin*, 829 F.3d at 1125). “Rather, the Court considers the ‘totality of
 24 the parties’ actions.’” *Id.* “But ‘a party’s extended silence and delay in moving for arbitration may
 25 indicate a “conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable
 26 claims,” which would be inconsistent with a right to arbitrate.’” *Chan v. Panera, LLC*, 2024 WL
 27 4137332, at *2 (C.D. Cal. Sept. 3, 2024) (quoting *Martin*, 829 F.3d at 1125). “Generally, a party
 28 acts inconsistently with exercising the right to arbitrate where he ‘chooses to delay his right to

1 compel arbitration by actively litigating his case to take advantage of being in federal court.””
 2 *Chan*, 2024 WL 4137332, at *2 (quoting *Martin*, 829 F.3d at 1125).

3 On all fours, in *Earn Guild PTE LTD v. Crowdcreate, LLC*, the plaintiff hired the defendant
 4 to market its business. *Earn Guild*, 2024 WL 5365055, at *1 (C.D. Cal. Dec. 16, 2024). In
 5 November 2023, the plaintiff filed suit for breach of contract. *Id.* In January 2024, the defendant
 6 filed an answer, which did not include any discussion of arbitration. *Id.* The parties then filed a
 7 Joint Rule 26(f) report, and participated in a scheduling conference. *Id.* On October 1, 2024, the
 8 court granted the defendant’s request to substitute attorneys. *Id.* On October 29, 2024, the
 9 defendant filed a motion to compel arbitration. *Id.* The plaintiff opposed, arguing the defendant
 10 waived the right to arbitrate. *Id.* at *2.

11 In ruling on the motion, the *Earn Guild* court noted:

12 the record is devoid of any mention of arbitration by Defendant, until this Motion
 13 was filed. Defendant did not assert the right to arbitrate as a defense in its Answer,
 14 Defendant did not mention arbitration in any of its reports submitted to the Court,
 nor is there any evidence presented to the Court that Defendant mentioned
 arbitration in any of the several conferences held with Plaintiff and the Court.

15 *Id.* at *3.

16 The court went on:

17 The fact that Defendant signaled its intention to file a dispositive motion to enforce
 18 sections of the Agreement, but not the Arbitration Clause, weighs in favor of
 19 finding Defendant made an intentional decision to litigate in this Court and not to
 20 enforce the Arbitration Clause. Notably, in the “Substantive Motions” section of
 21 both the first and second 26(f) Report, Defendant stated, “Defendant anticipates
 22 filing a dispositive motion to enforce the specific and unambiguous provisions in
 Sections 4 and 6 in the contract between the parties that there is ‘no right to
 chargebacks or refunds, for any reason.’” (Dkt. Nos. 16, 26.) Defendant could have,
 but did not, state an intent to move to enforce the Arbitration Clause, Section 8 of
 the Agreement.

23 *Id.*

24 Ultimately, the *Earn Guild* court held that the defendant waived the right to seek
 25 arbitration. *Id.*

26 The *Earn Guild* decision is nearly a carbon copy of what happened in the case at bar.
 27 Plaintiff filed the action nearly a year ago. Defendant filed an answer, but that answer contained
 28 no mention of arbitration, including in its affirmative defenses, even though arbitration is a

1 specifically enumerated affirmative defense under Federal Rule of Civil Procedure 8(c)(1). *See*
 2 *Morgan*, 596 U.S. at 414 (“ Sundance then answered Morgan’s complaint, asserting 14 affirmative
 3 defenses—but none mentioning the arbitration agreement”); *see also KST Data, Inc. v. DXC Tech,
 4 Co.*, 980 F.3d 709, 714 (9th Cir. 2020) (“Generally, an affirmative defense that is not asserted in
 5 an answer to the complaint is waived or forfeited by the defendant”).

6 The parties filed a Joint Case Management Statement, but at no point in the Joint Case
 7 Management Statement did Defendant make any mention of arbitration. To the contrary, it
 8 discussed filing dispositive motions and set out dates for Plaintiff to move for class certification.
 9 This runs directly contrary to the arbitration clause’s Class Action Waiver, which Defendant now
 10 seeks to enforce. *See* Motion at 11. Equally, Defendant **requested a jury trial**, which is also
 11 excluded by the arbitration clause. *See* Vikmanis Decl., Ex. A at 12 (“BY AGREEING TO
 12 ARBITRATE, USER IS GIVING UP THE RIGHT TO LITIGATE (OR PARTICIPATE IN AS
 13 A PARTY OR CLASS MEMBER) ANY AND ALL CLAIMS IN COURT BEFORE A JUDGE
 14 OR JURY. INSTEAD, A NEUTRAL ARBITRATOR WILL RESOLVE ALL CLAIMS”).

15 The parties submitted a Stipulated Protective Order, and took part in a Case Management
 16 Conference where the Court adopted a proposed schedule on class certification. Again, there was
 17 no mention of arbitration.

18 Defendant tried to have another case related to this suit, arguing “adjudicating these two
 19 cases separately risk judicial interference and inconsistent judgments for substantially similar cases
 20 in two different District Courts.” ECF No. 27. ¶ 5.

21 The parties engaged in discovery, with Plaintiff serving multiple rounds of discovery
 22 requests, and the parties met and conferred several times. These requests and the subsequent
 23 productions encompassed both Plaintiff and the class members. Yet there was no objection or even
 24 mention of arbitration.

25 This procedural posture aligns almost perfectly with that in *Earn Guild*, and like *Earn*
 26 *Guild*, it was only after Defendant switched counsel, and presumably strategy, that it moved to
 27 compel arbitration. But “retaining new counsel does not provide the opportunity to re-strategize a
 28 lawsuit.” *DropZoneMS, LLC v. Cockayne*, 2019 WL 2070417, at *5 (D. Or. Feb. 27, 2019); *see*

1 *Comm. Dental Serv. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002) (“Clients are ‘considered to have
 2 notice of all facts known to their lawyer-agent’”); *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D.
 3 604, 621 (C.D. Cal. 2013) (“Once again, Reinsdorf is bound by the decisions of his prior counsel
 4 and cannot use those decisions, now that he disagrees with them, as a basis to reopen discovery”).

5 Like the defendant in *Earn Guild*, Defendant took multiple acts which were inconsistent
 6 with its right to arbitrate, instead seeking to litigate this matter in this court.

7 But *Earn Guild* is not alone. Equally instructive is the decision in *Chan v. Panera, LLC*. In
 8 *Chan*, the plaintiff brought suit against her employer for violations of California’s Labor Code.
 9 *See Chan*, 2024 WL 4137332, at *1 (C.D. Cal. Sept. 3, 2024). The plaintiff originally brought suit
 10 in Los Angeles County Superior Court, but the defendant removed under CAFA. *Id.* Sometime
 11 later, when the defendant moved to compel arbitration, the plaintiff opposed, arguing waiver. *Id.*
 12 The court agreed, noting Panera waited fifteen months to file the motion. *Id.* at *3. Panera argued
 13 that the delay was due to a mediation, but the court was not buying it, noting “because the Court
 14 did not stay the action, litigation was in full swing.” *Id.* Additionally, the court held that “Panera
 15 engaged in extensive litigation conduct that was inconsistent with the intent to arbitrate. The action
 16 was initiated on April 21, 2023, and rather than move to compel arbitration, Panera answered the
 17 Complaint and removed the action to federal court under CAFA.” *Id.* It also noted that, “[w]hile
 18 the motion to remand was being litigated, the parties also engaged in a Rule 26(f) conference and
 19 submitted a Joint Rule 26(f) Report with a proposed litigation schedule. On October 5, 2023, the
 20 Court issued a Scheduling Order and still, Panera had not moved to compel arbitration.” *Id.*
 21 (citation omitted) “Instead, Panera began engaging in discovery. As Chan points out, Panera has
 22 responded to substantial discovery requests in this action. This included multiple meet-and-confer
 23 efforts, three informal discovery conferences, responses to formal discovery requests, and then
 24 supplemental responses.” *Id.* (citation omitted). The court also noted that “the parties stipulated to
 25 the entry of a protective order to facilitate the exchange of class-related discovery and, once again,
 26 Panera did not mention an intent to compel arbitration.” *Id.* “Following entry of the protective
 27 order, Panera provided time records, payroll records, and contact information for 20% of the
 28 putative Class Members.” *Id.* at *4.

1 As with *Earn Guild*, the *Chan* procedural history aligns closely with the case at bar where
 2 Defendant: 1) answered the complaint; 2) engaged in a Rule 26(f) conference and submitted a Rule
 3 26(f) Report; 3) proposed and allowed the Court to adopt a schedule for class certification; 4) filed
 4 a Stipulated Protective Order; and 5) engaged in discovery, including the exchange of information
 5 relevant to class certification. All the while, Defendant was silent on arbitration.

6 Equally instructive is the decision in *Slaten v. Experian Information Solutions*, where the
 7 plaintiff brought suit against a credit reporting agency for violation of the Fair Credit Reporting
 8 Act and its California equivalent. *Slaten*, 2023 WL 6890757, at *1. When the defendant moved to
 9 compel arbitration, the plaintiff opposed on the grounds of waiver, which the court agreed. *Id.* at
 10 *2. While the action was pending for eighteen months before the defendant moved, the court noted
 11 that the defendant waited for five months after it knew of the arbitration provision but “provide[d]
 12 no reason for the five-month delay.” *Id.* at *4. Additionally, the court held that

13 EIS’ actions in this litigation suggest that it intentionally abandoned its right to
 14 arbitration. Since the Complaint was filed, EIS has met and conferred with
 15 Plaintiff’s counsel, joined a motion for a protective order, sought to extend
 16 discovery deadlines multiple times, responded to written discovery, produced
 17 documents, participated in discovery conferences, and submitted a Joint Rule 26(f)
 18 Report.
Id. at *5.

19 The *Slaten* court also considered the defendant’s statements made during litigation, noting:
 20 EIS made representations to the Court suggesting that it would not seek to compel
 21 arbitration. In the parties’ Joint Rule 26(f) Report, EIS stated that it “anticipates it
 22 may file a motion for summary judgment” on issues going to the merits of Plaintiff’s
 23 claims. (See Joint Rule 26(f) Report (Docket No. 19) at 5). At no point did EIS raise
 24 the potential of arbitration in the Joint Rule 26(f) Report, its Answer, or any other
 25 prior filing.

26 *Id.*

27 Here, the procedural posture aligns with *Slaten*, where there was no dispositive motion,
 28 and the parties conducted a Rule 26(f) conferences and submitted a reports, stipulated to a
 29 protective order, and conducted discovery. Likewise, in the Rule 26(f) report, Defendant only
 30 mentioned its intent to seek summary judgment, but made no mention of arbitration. Defendant
 31 also went further by proposing a schedule for class certification and ***requesting a jury trial***.

1 Defendant may argue that *it* did not propound discovery on Plaintiff, but here again, *Chan*
 2 is instructive. The *Chan* defendant made this same argument, but the court correctly rejected this,
 3 noting, “[i]t does not matter that Panera did not propound the discovery requests itself; its conduct
 4 in discovery reflected an intent to litigate a motion for class certification, which is inconsistent
 5 with the intent to compel arbitration.” *Id.* at *4.

6 This is supported by the Ninth Circuit’s decision in *Banq, Inc. v. Purcell*, where it stated:

7 Defendants also participated in discovery proceedings before the district court by
 8 submitting an amended joint Rule 26(f) report, a discovery plan and scheduling
 9 order, a stipulated protective order, and a stipulation regarding documents and
 10 electronically stored information. While Defendants correctly point out that they
 11 were required to participate in at least some discovery proceedings, *see Fed. R. Civ.*
 12 *P. 26(f), D. Nev. R. 26-1*, their actions still demonstrate active litigation on the
 13 merits. Defendants chose to participate in these discovery proceedings without
 14 actively seeking or preserving their right to arbitrate. So, the discovery proceedings
 15 show Defendants wanted “to take advantage of being in court.” *Armstrong*, 59 F.4th
 16 at 1015 (simplified).

17 *Banq, Inc.*, 2024 WL 4164126, at *2.

18 Defendant may also argue that it did not move to dismiss, and thus seek an order on the
 19 merits, but again *Chan* is directly on point. It noted, “no Ninth Circuit authority suggests that a
 20 defendant *must* move for a judgment on the merits in order to waive the right to arbitrate.” *Chan*,
 21 2024 WL 4137332, at *4. The *Slaten* court also rejected this same argument, stating, “[s]eeking a
 22 decision on the merits is just one consideration that ‘**may** satisfy this element.’ In other words, a
 23 merits-based decision is neither sufficient nor necessary to demonstrate that [the defendant] acted
 24 inconsistently.” *Slaten*, 2023 WL 6890757, at *1 (citing *Plows*, 812 F.Supp.2d at 1067) (emphasis
 25 in original).

26 In fact, the *Earn Guild*, *Chan*, and *Slaten* courts found waiver where the defendants did
 27 **not** seek dispositive rulings.

28 Finally, Defendant may argue that ten and half months is not sufficient delay. But there is
 29 no set amount of time necessary to constitute “a prolonged delay.” To the contrary, in *Banq, Inc.*,
 30 the Ninth Circuit held that five months was sufficient “under the totality of the circumstances.”
 31 *Banq, Inc.*, 2024 WL 4164126, at *2. And while *Banq*, involved a motion to dismiss, the delay
 32 was also significantly shorter than that present here, where the delay is much closer to the twelve

1 months at issue in *Earn Guild*. See *Morgan*, 596 U.S. at 415 (litigated for eight months before
 2 moving to compel arbitration); *Powell v. UHG I LLC*, 2024 WL 2305206, at *4 (S.D. Cal. May 21,
 3 2024) (finding waiver after seven months and did **not** seek a dispositive ruling).

4 Further supporting this “totality” conclusion is the fact that Defendant asked for **a jury**
 5 **trial**, while also jointly proposing a date for class certification briefing and participating in class
 6 certification discovery; none of which is allowed under the at-issue arbitration clause.

7 **CONCLUSION**

8 Defendant waived the right to compel arbitration. It knew the terms on its own site,
 9 including the right to arbitrate. But it has acted inconsistently with those terms—for almost a
 10 year—by:

- 11 1) Answering the complaint without invoking arbitration as an affirmative defense;
- 12 2) Submitting a Joint Rule 26(f) Report which: a) mentions summary judgment but not
 arbitration; b) proposes a schedule for Plaintiff’s motion on class certification; c) requests
 a jury trial;
- 13 3) Submitting a Stipulated Protective Order to facilitate class wide discovery;
- 14 4) Seeking to have the *Hernandez v. Event Tickets Centers, Inc.* action transferred to this
 Court for joint resolution of both matters; and
- 15 5) Engaging in class-wide discovery, including responding to class-wide discovery
 requests and conducting several meet-and-confers.

20 Having knowingly acted inconsistently with its right to arbitrate, Defendant waived its right
 21 to now compel Plaintiff to do so. Quite simply, it chose not to invoke the arbitration provision for
 22 nearly a year; it must live with that choice. Its Motion to Compel Arbitration should be denied.

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